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In the Supreme Court of the United States

OCTOBER TERM, 1950

NO.

EMORY S. LAND, EDWARD MACAULEY, JOHN M. CARMODY, RAYMOND S. MCKEOGH, WILLIAM W. SMITH, RICHARD PARKHURST, GRENVILLE MEAD, AND J. K. CARSON, JR., Former Members of the United States Maritime Commission, *Petitioners*

v.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE ROBERT DOLLAR CO., and H. M. LORBER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Emory S. Land and other former members of the United States Maritime Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of

Columbia Circuit entered in the above-entitled case on July 17, 1950.

OPINIONS BELOW

The opinion of the district court (R. 258-275) is reported at 82 F. Supp. 919. The opinion of the Court of Appeals (R. 2144-2158) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 17, 1950 (R. 2159). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

Respondents brought suit to enjoin members of the Maritime Commission from selling or otherwise disposing of the common stock of an operating steamship corporation (Dollar of Delaware) and to compel them to turn over that stock to respondents. The district court, sitting without a jury, found that the Maritime Commission had statutory authority to acquire and had acquired absolute title to the stock under a contract between it and respondents. The resultant judgment against the respondents was reversed by the court of appeals because it found that the contract was one of pledge rather than sale. The questions presented are:

1. Whether this suit, contesting the title of the United States to property in its possession, is an unconsented suit against the United States since it

has not been shown, and the court below did not find, that the property is being withheld by action in excess of valid statutory authority.

2. Whether, if the district court had jurisdiction to adjudicate the question for any purpose, its finding of fact, based on mixed documentary and oral testimony, that the stock belonged to the United States and not to respondents, could be set aside by the appellate court under Rule 52(a) of the Federal Rules of Civil Procedure though the finding is not held to be "clearly erroneous" by the appellate court, and, if so, whether the court of appeals correctly found the contrary.[1]

STATUTE AND RULE INVOLVED

The relevant provisions of the Merchant Marine Act of 1936, as amended, 49 Stat. 1985, 46 U. S. C. 1101, *et seq.*, and the provisions of F. R. C. P. 52(a) are set forth in Appendix A, *infra*, pp. 26-28.

STATEMENT

In 1938, certificates representing 92 per cent of the common stock of an operating steamship corporation, Dollar Steamship Lines, Inc., Ltd. (Dol-

[1] Should certiorari be granted, the Government wishes to reserve the right to present for this Court's consideration the following additional question: Whether, assuming (a) that the Maritime Commission had no statutory authority to acquire ownership of the stock, and (b) that the transfer was in fact absolute, not a pledge, the respondents are estopped from asserting the invalidity of the agreement because of their receipt and enjoyment of the benefits of the agreement.

lar of Delaware),[2] were transferred by the then stockholders, endorsed in blank, to the United States Maritime Commission pursuant to an "Adjustment Agreement" under which Dollar of Delaware obtained from the Maritime Commission a $2,000,000 loan for repairing its vessels and a five-year operating differential subsidy, and obtained from the Reconstruction Finance Corporation a $2,500,000 loan for operating capital. Under the Adjustment Agreement, R. Stanley Dollar and Dollar Steamship Line (Dollar of California), the transferors of the largest blocks of stock, were released from their respective liabilities of $1,781,250 and $3,575,193 as sureties on obligations of Dollar of Delaware to the Government.

Prior to execution of the Adjustment Agreement on August 15, 1938, the financial position of Dollar of Delaware, which operated passenger and freight vessels on trans-Pacific and around-the-world routes, was so precarious that it was on the verge of bankruptcy (R. 260, 1065). The common stock of that company, which was owned almost entirely by R. Stanley Dollar, Dollar of California and other interrelated Dollar corporations, and a few business associates of Mr. Dollar, had no market value and Dollar of Delaware was in default on obligations to the Government totaling approximately $7,500,000. The Commission held as

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[2] Its name was subsequently changed to American President Lines, Ltd.

collateral for this debt mortgages on several ships owned by Dollar of Delaware.[3] In addition, R. Stanley Dollar and Dollar of California were sureties on these obligations in the amounts of $1,781,250 (R. 168) and $3,575,193, respectively (R. 64-65).

For more than a year, the Dollar interests had been negotiating with the Maritime Commission in an endeavor to avoid bankruptcy of Dollar of Delaware by reorganizing its financial affairs so that it might receive necessary financing by way of government loans and qualify for an operating differential subsidy under the Merchant Marine Act of 1936, Appendix A, *infra*, p. 27. Between April and June 1938, the Maritime Commission was insisting that R. Stanley Dollar and Dollar of California, as well as associated corporations and H. M. Lorber, a minor stockholder of Dollar of Delaware, enter into guarantees of the *entire* $7,500,000 debt of Dollar of Delaware, to be secured by pledges of their stockholdings in the various Dollar corporations, including the common stock of Dollar of Delaware, as a condition to the furnishing of government financing to Dollar of Delaware by way of working capital and ship repair loans and an operating differential subsidy (R. 103-104, 107-111, 157-176). The Commission was reluctant, in ex-

[3] This debt was incurred for the purchase of twelve ships and the construction of two others by Dollar of Delaware and its predecessor during the years 1923 to 1929 (R. 260).

tending financial aid, to create common stock equity values in favor of persons who were unwilling themselves to assume any financial obligations whatever (R. 1639). Dollar of California, as well as the other Dollar interests, refused to give the requested guarantees and pledges but made the Commission an alternate proposal under which Dollar of California would "surrender" to the Commission its common stock holdings in Dollar of Delaware on condition that it be released from its suretyship liability to the Government (R. 243-246).[4] Further negotiations, culminating in the Adjustment Agreement, took place on the basis of the "surrender" proposal. In these negotiations, the proposed transfer of stock to the Commission was never referred to, either orally or in writing, as a pledge (R. 1801).[5]

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[4] Dollar of California considered that an "ominous situation", making valueless the common stock of Dollar of Delaware, was created by the passage by Congress on June 13, 1938, of the amendment to the Bankruptcy Act permitting the Maritime Commission to operate vessels of bankrupt shipping corporations on which the United States holds mortgages and denying the courts power to issue any injunction affecting the United States as a preferred ship mortgagee (Act approved June 23, 1938, 52 Stat. 938, 11 U. S. C. 1101-1103) (R. 250).

[5] At a Commission meeting on July 12, 1938, the Executive Director submitted a detailed memorandum of the plan under negotiation and pointed out that the transfer of the stock entailed "ownership" of the "controlling interest" in Dollar of Delaware and that the Commission could in a short time dispose of such ownership to that company's long-time employees. The Commission formally adopted this plan. (R. 1672-1689.)

The Adjustment Agreement did not describe the stock transfer as a pledge, although by contrast that agreement, in describing a pre-existing pledge to the Anglo Bank of part of the stock, used the word "pledge" several times (R. 35-36). With reference to the stock subject to the bank pledge, the agreement provided that "all rights and interests of the respective pledgors" (R. Stanley Dollar and J. Harold Dollar Estate) would be transferred to the Commission subject to existing pledges (R. 36). In accordance with a provision of the agreement, R. Stanley Dollar and the estate of J. Harold Dollar executed assignment and option agreements with respect to the stock subject to the bank's pledge which used the words "hereby sells, assigns, transfers, and sets over unto the Commission, subject to said existing pledge, all his right, title, and interest in and to" the stock. With reference to the stock not subject to the pre-existing pledge to the Anglo Bank, the agreement provided for transfer to the Commission "free and clear of all liens and encumbrances" (R. 35). All parties agree that no distinction is to be made as to the nature of the transfer of the stock subject to the bank pledge and the other stock not so subject.

On the day the Adjustment Agreement was executed, but prior to the actual transfer of the stock, the Maritime Commission issued a press release stating that the agreement would transfer to the Commission "absolute title" to the stock. Mr.

Dollar can reasonably be presumed to have noticed this release, and although he was free to terminate the entire agreement, he, with the other stockholders, two months later delivered the certificates, endorsed in blank, to the Commission (R. 352-359). The transferors retained their preferred stock holdings in Dollar of Delaware (R. 1715-1716).

Mr. Dollar and Mr. Lorber, in their respective 1938 tax returns, wrote off their ownership of the common stock as a capital loss, on the ground that they had transferred "all right, title and interest in and to" the stock (R. 1180-1187; 1760-1763, 1765-1769). On September 12, 1938, executors of the estate of J. Harold Dollar, represented by counsel who participated in the transfer negotiations, secured an order from the California probate court authorizing the transfer "of all right, title and interest" to the stock, to consummate the agreement (R. 1476-1479). Prior to the Adjustment Agreement, Dollar of California carried as an asset on its balance sheet the stock it subsequently transferred to the Commission. But in its balance sheet as of December 31, 1938, this stock was entirely omitted. In a report approved by the stockholders of Dollar of California, the accountant who prepared this balance sheet stated that the company's investment in this stock had been charged to income for 1938 upon the release to the Commission of the shares "previously owned" (R. 1511-1516, 1521-1522).

The Maritime Commission, in its annual reports to Congress for 1938 and 1939, made pursuant to Section 208, 46 U. S. C. 1118, referred to the fact that it had acquired this stock and was the majority stockholder in Dollar of Delaware (United States Maritime Commission, *Report to Congress for the period ended October 25, 1938*, p. 11; United States Maritime Commission, *Report to Congress for the period ended October 25, 1939*, p. 10):

> On August 15, 1938, an agreement for reorganization was approved whereby the Commission acquired about 90 percent of the outstanding common stock of the Dollar Line, in consideration for releasing R. Stanley Dollar and the Dollar Steamship Co. of California from their liabilities as endorsers or comakers on the ship mortgage notes held by the Commission.
>
> This adjustment plan was consummated in October 1938 and the Commission as majority stockholder obtained complete control in the selection of the management. * * *

During the war years, Dollar of Delaware, having received the benefit of the financing made possible by the transfer agreement, greatly improved its financial position. It paid off its entire debt to the Government by October, 1943 (R. 66), and the stock transferred to the Commission became of great value. In 1945, the Maritime Commission made a public offer to sell this stock at auction

and received a bid of more than $8,000,000 (R. 29-30, 68). In July 1945, respondents for the first time asserted that they had merely pledged the stock (R. 97), and upon the Commission's refusal to return it to them, instituted this action to prevent the sale of the stock to others and to compel the Commission to return the stock to them.

The original suit was filed in the District Court for the District of Columbia on November 6, 1945 (see Transcript of Record, *Land* v. *Dollar*, 330 U. S. 731, October Term, 1946, No. 207, p. 1). It was dismissed by the district court *sua sponte* on the ground that the pleadings on their face showed that the case was an unconsented suit against the United States. That decision was reversed by the Court of Appeals, *Dollar* v. *Land*, 154 F. 2d 307. On April 7, 1947, this Court held (330 U. S. at 739) that the "District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits," stating that (330 U. S. at 735-736):

> The allegations of the complaint, if proved, would establish that petitioners are unlawfully withholding respondents' property under the claim that it belongs to the United States. That conclusion would follow if either of respondents' contentions were established: (1) that the Commission had no authority to purchase the shares or acquire them outright; or (2) that, even though such authority existed, the 1938 contract resulted not in an outright transfer but in a pledge of the shares.

The case was returned to the district court for further proceedings in accordance with this holding. The respondents amended their complaint to allege in the words of the opinion that the Commission had no authority to acquire absolute ownership of the stock and that the transfer was in fact a pledge (R. 11-12). Petitioners answered, alleging that their actions were fully authorized (R. 92), that the agreement was an outright transfer (R. 89), and that respondents were estopped from asserting the invalidity of the agreement (R. 101).

On December 2, 1948, after a lengthy trial, the district court, sitting without a jury, held that the Commission was authorized to take absolute title to the stock and found that the contract was one of sale rather than of pledge (R. 258-275, 82 F. Supp. 919). On June 27, 1949, this Court handed down its decision in *Larson* v. *Domestic and Foreign Corp.*, 337 U. S. 682, holding that a district court has no jurisdiction over a suit to recover property in the possession of the United States unless the property is being wrongfully withheld by officers acting in excess of their statutory authority or under an invalid statute. The appeal in the case at bar was argued on April 19, 1950, and decided on July 17, 1950 (R. 2144).

In its decision, the court below passed over the question whether the Commission had statutory authority to acquire absolute ownership of the stock of an operating steamship corporation (R.

2147) and proceeded to consider whether the transfer was absolute or simply a pledge. It disregarded the findings of fact of the district court on the ground that "the findings of the trial judge rested entirely upon documentary evidence or undisputed basic facts" (R. 2146). On its own view of the evidence, which it said pointed both ways, the court below found that the transfer was a pledge. It leaned "principally" upon two criteria for assessing the legal significance of the facts, (a) that where a debt is not discharged and the grantor is still left owing the money, a transfer of property by the grantor to the creditor will be deemed a pledge rather than an absolute sale (R. 2152), and (b) the stock was held by the Commission in its own name rather than in the name of the United States[6] (R. 2154). The court accordingly reversed the district court and directed the entry of a decree in conformity with its opinion (R.).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to hold this is a suit against the United States to which the United States has not consented.

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[6] The stock certificates are actually now in the custody of the Secretary of Commerce (see letter, Appendix B, *infra*, p. 29), pursuant to Reorganization Plan No. 21 of 1950 (15 F. R. 3178) transferring to that official the functions of the former Maritime Commission. A motion to substitute the Secretary of Commerce as petitioner in this case is being filed concurrently with this petition.

2. In passing over the question whether the Maritime Commission was authorized to acquire outright ownership of the stock of an operating steamship corporation.

3. In failing to decide that the Maritime Commission was authorized to acquire outright ownership of the stock of an operating steamship corporation.

4. In failing to apply Rule 52(a), Federal Rules of Civil Procedure, to the findings of fact of the district court.

5. In setting aside the findings of fact of the district court that the transfer of the stock was a sale, not a pledge.

6. In directing the entry of a decree favorable to respondents.

REASONS FOR GRANTING THE WRIT

1. In *Larson* v. *Domestic and Foreign Corporation*, 337 U. S. 682, this Court held that the "only" "types" of case "in which a restraint may be obtained against the conduct of Government officials" are (1) those in which the officer's powers are limited by statute, and his actions complained of go beyond those limitations, or (2) those in which "the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional," 337 U. S. 689-690. In this case, the court below explicitly refused to decide whether the power to acquire outright

ownership of the stock in question is within the statutory grant of authority to the Maritime Commission (R. 2147). Indeed, it noted that the Commission's claim to such power "has strong basis" (R. 2147). Nevertheless, the court below allowed this suit to proceed, though it, like *Larson*, is one in which the claim is that petitioners, as government officers, wrongfully withheld property belonging to the respondents, private claimants. As such, and in the absence of a finding of lack of valid statutory authority, this, like *Larson*, is an unconsented suit against the United States.

In reaching a conclusion so strikingly in conflict with the ruling of this Court in the *Larson* case, the court below relied on this Court's earlier decision at an earlier stage of this very litigation. *Land* v. *Dollar*, 330 U. S. 731. It read this Court's opinion in that case as holding that this would not be a suit against the United States if the transaction were a pledge and not an outright transfer of title. The Government does not contend that there is no warrant for such a reading of the first *Land* v. *Dollar* opinion. But it does insist that the subsequent opinion of this Court in the *Larson* case, concurred in by the author of the opinion in *Land* v. *Dollar*, puts it beyond doubt that the Court of Appeals' reading of the governing decisions of this Court is erroneous. For, in *Larson*, the majority of the Court, rejecting dissenting views specifically raising doubts on this very point, described its

holding in *Land* v. *Dollar* as permitting the suit to continue only because the "complaint * * * alleged that the members of the Commission 'acted in excess of their authority as public officers.'" 337 U. S. at 702, note 26; see also 337 U. S. at 726.

If the *Larson* decision leaves any doubt that the court below erred in this case, that doubt can be resolved by this Court alone. And, if there be no doubt that the court below erred, it is of the utmost importance that this error be corrected in this very case.[7] For, the importance of the decision below can hardly be over-estimated. The ruling on suits against the United States unsettles difficult and important legal problems clearly resolved by this Court's *Larson* decision. Its effect in this respect is particularly harmful since, unless reversed, the decision below controls the district courts in the District of Columbia, where most of the suits to

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[7] The doctrine of "law of the case" is not here relevant since the question is not the effect to be given this Court's first *Land* v. *Dollar* decision but rather the meaning of that decision. But, even if relevant, the doctrine certainly imposes no limitation on this Court's power to reconsider. *Messenger* v. *Anderson*, 225 U. S. 436, 444.

It is also immaterial that petitioners failed to raise the jurisdictional point upon the remand of the case to the district court and prior to the *Larson* case. The objection that a suit is an unconsented suit against the sovereign cannot be waived, except by Congress, *Stanley* v. *Schwalby*, 162 U. S. 255, 270, and can be noted by the court, *sua sponte*, at any time. Cf. *Hoe* v. *Wilson*, 9 Wall. 501, and 2 Moore's Fed. Pr. (1949 Cum. Supp.) p. 2242.

restrain or compel acts of government officials are brought.

The situation is one peculiarly and especially demanding of consideration by this Court. Apart from the basic issue of which we have already spoken, it is not to be forgotten that this Court has already determined that *this case* is worthy of the Court's consideration. It involves now, as it did on the first review, a claim by the Government to ownership of property worth several million dollars, carrying with it control over a major steamship company engaged in the now even more vital trans-Pacific trade.

Though the Court below erroneously failed to pass on the question, the statutory authority of the Commission to acquire such stock is in dispute here. The Government believes that Section 207 of the Merchant Marine Act of 1936, as amended, 46 U. S. C. 1117, Appendix A, *infra*, p. 26, affords ample basis for this authority either (1) as a contract deemed necessary by the Commission to protect collateral for an indebtedness—in this case, ship mortgages on vessels owned by Dollar of Delaware, securing a debt due from Dollar of Delaware to the Commission; or (2) as a contract deemed necessary by the Commission in carrying out its authorized activities—in this case, the granting of an operating differential-subsidy to a qualified applicant on reasonable terms pursuant to sections 601 (a) and 603 (a) of the Act, 46 U. S. C. 1171(a), 1173(a), Appendix A, *infra*, pp. 26-27; or (3) as

a readily implied power of the Commission, having the powers of a private corporation, to compromise debts due to the Government.[8]

The case involves, additionally, an important problem not presented on the first appeal, to which we now turn.

2. (a) The effect of the judgment below is to read out of Rule 52 (a) of the Federal Rules of Civil Procedure a basic guide to appellate review in the federal judicial system. That Rule provides, in pertinent part, that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses." Appendix A, *infra*, pp. 27-28.

The court below, in purported reliance on *Orvis* v. *Higgins*, 180 F. 2d 537 (C. A. 2), certiorari denied October 9, 1950, which in turn relied on the decision of this Court in *United States* v. *Gypsum Co.*, 333 U. S. 364, 394, ruled that because "the findings of the trial judge rested entirely upon documentary evidence or undisputed basic facts" (R. 2146), it could ignore the trial judge's finding. In the first place, the record in this case shows that the evidence was not solely documentary or undis-

[8] It was this last ground which the court below felt offered a "strong basis" for the Commission's authority (R. 2146), though it doubted that the second ground offered any support (R. 2156). The district court did not pass on this second ground, but held that the first and third provided clear authorization (R. 263-267).

puted, but that on the question of the intent of the parties to the transaction, both parties offered witnesses' testimony—six for respondents and seven for petitioners (R. x, xvi).[9]

But, passing that, the more serious mischief worked by the court below is that it derives from the alleged fact that there was no need, here, to give "due regard * * * to the opportunity of the trial court to judge of the credibility of the witnesses," the unwarranted conclusion that findings of fact may be set aside though not "clearly erroneous." Thus, not once in its opinion does the court below express a "definite and firm conviction that a mistake" had been committed by the trial court. *United States* v. *Gypsum Co.*, 333 U. S. 364, 394-396. Not once is the appellation "clearly erroneous" affixed to the trial court's findings.

On the contrary, the court below noted (R. 2148) that the answer to the factual problem presented "depends upon the comparative evaluation of various indices, some pointing one way and some the other." It arrived at its opinion that the transfer of the shares was a pledge only "upon balancing the conflicting considerations" (R. 2152). But where a question of balance is involved, where the evidence supports "a conclusion either way," "a choice between two permissible views of the weight of the evidence is not 'clearly erroneous' ". *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 342.

[9] This excludes the testimony of Land, Woodward and Page which was excluded by the district court.

Nothing in this Court's *Gypsum* opinion or in the Second Circuit's *Orvis* v. *Higgins*, *supra*, is to the contrary. It is one thing to say that the appellate court, where the evidence is documentary or the basic facts undisputed and there is no question of credibility, is as well equipped as the trial court to judge of the true facts, *e.g.*, *Orvis* v. *Higgins*, 180 F. 2d 537, 539 (C. A. 2), *supra*. It is quite another for the appellate court, as here, to assume that that ability to judge permits it entirely to ignore the judgment of the trial court, and if the evidence, oral or documentary, permits of two reasonable inferences, to set aside the choice made by the district court. For so to hold is to bring to naught that part of Rule 52(a) which provides that "findings of fact shall not be set aside unless clearly erroneous." *Orvis* v. *Higgins*, *supra*, upon which prime reliance is placed by the court below, did no such thing. The court there stated that "the undisputed facts are such that we have a 'definite and firm conviction' that the trial judge was mistaken * * * We therefore hold [his] finding 'clearly erroneous' ". 180 F. 2d at 540. In the *Gypsum* case, this Court said that Rule 52(a) was applicable where "the inferences are drawn from documents or undisputed facts" (333 U. S. at 394).

The scope of review outlined by Rule 52(a) has two facets. The rule counsels due regard for the trial judge's opportunity to judge of the credibility of witnesses. But beyond that, it imposes a wise

guide to efficient judicial administration by requiring that due regard also be given to the fact that the case has been once judged and should not be treated on appeal as if it had had no prior consideration. By ignoring the "clearly erroneous" requirement of Rule 52(a), the court below has committed an egregious error which should be corrected by this Court.

(b) The finding of the district court, that the transfer of the stock was absolute, is not clearly erroneous, and the contrary finding of the court of appeals was reached in error. There is, as even a reading of the opinion below confirms (R. 2148-2151), ample evidence to support the district court's finding that the Adjustment Agreement transferred complete ownership of the stock to the Commission. The background of the agreement supports this reading of the terms of the agreement; the language of the agreement is much closer to an outright transfer than to a conditional pledge; the transferors were experienced business men, advised by able counsel, who knew the difference between a pledge and a sale;[10] the term "pledge" was not used to refer to the transfer to the Commission although it was used to describe existing liens on some of the stock. And, as the district court said, conclusive effect must be given

[10] The district court so found (R. 272), despite Mr. Dollar's testimony that he did not know the difference between a transfer of ownership and a pledge (R. 1177).

to the formal statements of the transferors, R. Stanley Dollar, Lorber, and the executors of estate of J. Harold Dollar,[11] made subsequent to the transfer, that they had given up all their interests in the stock (R. 272).

The reasons given by the court below for disregarding the weight of this evidence are themselves plainly erroneous. The court of appeals relied upon the equitable principle stated in 4 Pomeroy, *Equity Jurisprudence* (5th ed., 1941), § 1195, that in construing a conveyance of land accompanied by an agreement by the grantee to reconvey upon payment of a stated sum, if there is an indebtedness between the parties and this debt is not discharged by the conveyance of property but the grantor is regarded as still bound to pay it, then the transaction amounts to a mortgage and not a sale and contract of repurchase, whatever language the parties may have used.[12] Such a transaction bears no resemblance to the Adjustment Agreement, but in any event the Court of Appeals failed to appre-

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[11] The court of appeals discounted this admission (R. 2155) because it mistakenly thought the transfer was authorized under Section 773 of the California Probate Code, whereas it was authorized under Section 578 of that code, which does not require any cash payment (R. 1469).

[12] The court of appeals also cited (R. 2153, n. 7) 4 Pomeroy, § 1193, which deals with the invalidity of efforts to cut off the equity of redemption. That rule had no conceivable application here, since the Government debt was secured by ship mortgages (*supra*, pp. 4-5), and the Adjustment Agreement did not affect any equity of redemption in the ships.

ciate that here the grantors (the transferors of the stock) did *not* remain bound to pay the debt. On the contrary, they were expressly discharged from all liability (*supra*, p. 4). The only party remaining liable on the debt to the Government was Dollar of Delaware, which did not transfer any property.

The Court of Appeals held, without any citation of authority, that where a creditor receives property from a surety in consideration for releasing the surety, but without affecting the obligation of the principal debtor, the creditor holds such property as a pledgee (R. 2157). In truth, whether the creditor holds such property as a pledgee or as outright owner depends entirely upon the intention of the parties, and there is not even any presumption in equity that such a transaction results in a pledge rather than an outright transfer. See *In re Kimbrough-Veasey Company*, 292 Fed. 757 (N. D. Ga.); *McIlhenny* v. *Blum*, 68 Tex. 197, 4 S. W. 367. The release of the sureties without crediting the debt of Dollar of Delaware was of no concern to that company, since as principal debtor it would have been obligated to reimburse the sureties for any payment on the debt they might make. *Restatement of the Law of Security*, comment on Sec. 135, p. 367. The outright transfer of stock to a party providing new financing for a failing corporation is common practice. *French* v. *Shoemaker*, 14 Wall. 314; *Handley* v. *Stutz*, 139 U. S. 417; *Rosenberg* v. *Garfinkel*, 294 Mass. 196, 200 N. E. 907.

The second consideration relied upon by the court of appeals was that the Adjustment Agreement provided for the transfer of the stock to the "Commission, or its nominee" not to the "United States"; that the Commission caused new certificates to be issued in the name of "United States Maritime Commission" rather than the "United States"; and that the Commission continued to hold the certificates "in its own possession without transfer to any recognized repository of property of the United States" (R. 2154). The Maritime Commission was not organized as a government corporation and was not a legal entity separate from the United States. Section 201, 46 U. S. C. 1111; *United States* v. *Remund*, 330 U. S. 539. Hence, the Maritime Commission as such could not acquire any property interest. Any property interest it acquired would necessarily be vested in the United States.[13] Nevertheless, the

[13] *See In the Matter of Dollar-Matson Agreements*, 2 U. S. M. C. 387, 388 (1940): "Matson urges that the Commission is now disqualified from acting on the agreement by reason of its acquisition of 90 percent of the stock of American President Lines, Ltd., and because of its interest under the operating-differential subsidy agreement. * * * The objection to our jurisdiction is not tenable. The interest of the Commission is the interest of the United States, and was acquired in furtherance of the purposes expressed in the Merchant Marine Act, 1936, creating the Commission, and of the Shipping Act, 1916, conferring the regulatory powers here challenged. Neither the Commission nor any of the Commissioners has any personal or private interest. * * * The interest of the Commission in behalf of the public is not such as to disqualify the Commission from acting. * * *"

court of appeals seemed to think that although it was appropriate for the Commission to acquire a pledgee's interest in its own name, any acquisition of outright title should have been in the name of the United States.

It is, of course, not uncommon for government officials and agencies to acquire contract or property rights for the United States in the name of such officials or agencies. See *United States* v. *Remund, supra; In re Wilson,* 23 F. Supp. 236 (N. D. Tex.). The name used is of no legal significance; the substance of such transactions controls, and they inure to the benefit of the Government, not the official or agency. *Hodgson* v. *Dexter,* 1 Cr. 345, 363; *United States* v. *Remund, supra; In re Wilson, supra; North Dakota-Montana Wheat Growers Ass'n.* v. *United States,* 66 F. 2d 573 (C. A. 8).[14]

Nor is there any basis for the view of the court of appeals that the Commission "was an authorized custodian of collateral security" but not of property owned outright by the United States. Every government agency is the custodian of property owned by the United States (*e.g.*, supplies and furnishings). Section 202, as amended, 46 U. S. C.

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[14] See also *Cherry Cotton Mills, Inc.* v. *United States,* 327 U. S. 536; *Inland Waterways Corp.* v. *Young,* 309 U. S. 517, 523-524; *Federal Crop Insurance Corp.* v. *Merrill,* 332 U. S. 380, 383.

1112, plainly authorized the Commission to hold "property and interests of every kind, owned by the United States."[15]

It follows that whatever construction be given Rule 52(a), the court below erred in setting aside the finding of the district court that what was here involved was a sale and not a pledge.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER 1950

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[15] "All money, notes, bonds, mortgages, and securities of every kind, contracts and contract rights, lands, vessels, docks, wharves, piers, and property and interests of very kind, owned by the United States" formerly controlled by the United States Shipping Board, "are hereby transferrd to the Commission."

The provision in Section 206, as amended, 46 U. S. C. 1116, that all money in the construction loan fund, together with the proceeds of all debts, etc., transferred from the Shipping Board to the Commission should be deposited in the Treasury and maintained as a revolving fund available for expenditures by the Commission relates only to money, as appears from the statutory language. Corporate stock obviously cannot be put in a revolving fund and used for expenditures.

APPENDIX A

Section 207 of the Merchant Marine Act of 1936, 49 Stat. 1985, as amended, 52 Stat. 954 (46 U. S. C. 1117), reads in pertinent part as follows:

> SEC. 207. The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. * * *

Section 601(a) and Section 603(a) of the Merchant Marine Act of 1936, 49 Stat. 2001 (46 U. S. C. 1171, 1173), read in pertinent part as follows:

> SEC. 601. (a) The Commission is authorized and directed to consider the application of any citizen of the United States for financial aid in the operation of a vessel or vessels, which are to be used in an essential service in the foreign commerce of the United States. No such application shall be approved by the Commission unless it determines that * * * (3) the applicant possesses the ability, experience, financial resources, and other qualifications necessary to enable him to conduct the proposed operations of the vessel or vessels as to

meet competitive conditions and promote foreign commerce; * * *

SEC. 603. (a) If the Commission approves the application, it may enter into a contract with the applicant for the payment of an operating-differential subsidy determined in accordance with the provisions of subsection (b) of this section, for the operation of such vessel or vessels in such service, route, or line for a period not exceeding twenty years, and subject to such reasonable terms and conditions, consistent with this Act, as the Commission shall require to effectuate the purposes and policy of this Act, including a performance bond with approved sureties, if such bond is required by the Commission.

Rule 52(a), Federal Rules of Civil Procedure, reads as follows:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Request for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be

given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

APPENDIX B

THE SECRETARY OF COMMERCE
WASHINGTON 25

SEP 18 1950

The Honorable
J. Howard McGrath
Attorney General
My dear Mr. Attorney General:

Re: R. Stanley Dollar, et al
v. Emory S. Land, et al,
No. 10,299 in the U. S.
Circuit Court of Appeals
For the District of Columbia

Reorganization Plan No. 21 of 1950, which became effective May 24, 1950, abolished the United States Maritime Commission and the offices of its members, and transferred to the Secretary of Commerce the functions of the Maritime Commission other than regulatory and subsidizing functions. As a result, the shares of stock of American President Lines, Ltd., which are the subject matter of the above case, are now in my custody in my official capacity of Secretary of Commerce.

Sincerely yours,

/s/ CHARLES SAWYER
Secretary of Commerce

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 353

EMORY S. LAND, EDWARD MACAULEY, JOHN M. CARMODY, RAYMOND D. MCKEOUGH, WILLIAM W. SMITH, RICHARD PARKHURST, GRENVILLE MELLEN and J. K. CARSON, JR.,

Petitioners,

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE ROBERT DOLLAR CO., and H. M. LORBER,

Respondents.

Brief of Respondents in Opposition To Petition for Writ of Certiorari

HERMAN PHLEGER
MAURICE E. HARRISON
GREGORY A. HARRISON
MOSES LASKY
111 Sutter Street
San Francisco 4, California

CLINTON M. HESTER
MICHAEL M. KEARNEY
Shoreham Building
Washington, D. C.

Attorneys for Respondents.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO